83-597

No. .....

In The
Supreme Court of the United States
OCTOBER TERM, 1983

DALLAS COUNTY COMMISSIONERS COURT, ET AL.,
Petitioners,

VS.

MARSHA RICHARDSON, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

I.

WHETHER MARSHA RICHARDSON, A FORMER DEPUTY SHERIFF, WAS A PROPER CLASS REPRESENTATIVE OF A BROADLY DEFINED CLASS CONSISTING PRIMARILY OF UNSUCCESSFUL JOB APPLICANTS IN CLAIMS OF DISCRIMINATION UNDER 42 U.S.C. 2000-e, ET SEQ.

II.

WHETHER MARSHA RICHARDSON AND MEMBERS OF THE CLASS FAILED TO SUSTAIN THEIR BURDEN OF PROOF OF DISCRIMINATION VEL NON.

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Your Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above Cause on July 22, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was filed July 22, 1983, and is reported at 709 F2d. 1016 (5th Cir. 1983). A copy of the opinion is included in Appendix A, together with the judgment dated July 22, 1983, as well as a copy of the Trial Court's Judgment.

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[1]Petitioners herein are the Dallas County Commissioners Court consisting of County Judge Frank Crowley, Commissioner Jim Jackson, Commissioner Nancy Judy, Commissioner Jim Tyson and Commissioner Chris Semos.

GROUNDS FOR JURISDICTION

The Judgment sought to be reversed was entered by the United States Court of Appeals for the Fifth Circuit on July 22, 1983, affirming District Courts' judgment in all respects, except attorney fees. This Petition for Certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 2000e — 2000e-17
Fed. Rules Civ. Proc. Rule 23
Tex. Rev. Civ. Stat. Ann. Art. 6869
Tex. Rev. Civ. Stat. Ann. Art 6869c
Tex. Const. Art. 16 § 61 (Supp. 1980)

These Statutes, Rules and Constitutional provisions are set forth in Appendix B.

STATEMENT OF THE CASE

On June 26, 1974, Marsha Richardson, Respondent, filed a Charge of Discrimination with the E.E.O.C. claiming:

> "I believed that Dallas County Sheriff's Department discriminated against me because of my sex, female, in the following manner:
>
> 1. They failed to promote me to the better districts, at least four males have been promoted over me, and I am the only female in the department.
>
> 2. They denied me equal benefits that males enjoy. example car."

See R. Vol. II, p. 324.

On or about March 3, 1975, Respondent received a notification of right to sue from the E.E.O.C. See R. Vol. 2, pp. 3-5. She was employed on April 1, 1973, and resigned on May 14, 1975. (Hearing on Liability, 11/23/77, p.13) She worked as a deputy for twenty-five and one-half months.

Respondent filed her Complaint on March 11, 1975, in the District Court for the Northern District of Texas, Dallas Division, Cause No. CA3-75-0282-D, on behalf of herself and "all female persons who are employed or might be employed by the Dallas County Sheriff's Office as Deputy Sheriffs, who have been and continue to be adversely affected by the practices complained of herein". Respondent named as Defendants, then Sheriff Clarence Jones and Members of the Commissioners Court of Dallas County, Texas, claiming she was discriminated against on the basis of sex in violation of 42 U.S.C. 2000e-5 and injunctive relief for her and her class, as well as back pay and attorney's fees.

The case went to trial before the Court or November 23, 1977, on two Complaints, according to her attorney's statement to the Court:

1. The complaint is that she feels sex is a factor in not permitting her to go to the outlying district.

2. Her further Complaint is concerning the alleged retaliation that she was subjected to by co-workers and superiors after she filed the Charge.

The Defendants contended that a deputy was not an employee within 42 U.S.C. § 2000-e, et seq., and that there was no discrimination. (Hearing on Liability 11/23/77, p.6, l.10-15). Respondent did not seek Class Certification, having been asked by the Court:

> THE COURT: So at this time you're not seeking the Class Certification?
> MS. COFFEE: That's correct, Your Honor.

(Hearing on Liability, 11/23/77, Vol. I, p.8, L.5-7) The Respondent's attorney, having advised the Court that if the Court determines she's entitled to back pay and attorney's fees, she would like to put on that evidence, and the Court stated that "we'll just bifurcate those two issues". (Hearing on Liability 11/23/77, Vol. I, p.9, L.1-9)

Approximately two years later, September 18, 1979, the Court filed its Findings of Fact and Conclusions of Law. See R. Vol. I, pp. 77-82. The Court found, in Conclusion of Law No. 1, that the Court has jurisdiction of the parties and the subject matter. In Conclusion of Law No. 4, the Court found that Richardson's evidence established a prima facie case that she was discriminated against in job assignment and promotion on the basis of sex in violation of Title VII, and, in Conclusion of Law No. 5, that Defendants "did not rebut Richardson's prima facie case but that, in Conclusion of Law No. 6, any harassment suffered by Richardson after June 24, 1974, did not violate Title VII. Notwithstanding that Respondent's attorney advised that she was not seeking Class Certification, the Court found, under Conclusion of Law No. 8, that Richardson established a prima facie case that the action should be certified as a class action under Rule 23(b) (2) of the Federal Rules of Civil Procedure and that the class consists of all past, present and future female commissioned employees and all past, present and future female applicants for commissioned employee positions at the Sheriff's Office who are, were, or continued to be limited, classified, or discriminated against in ways which deprive or tend to deprive them of equal employment opportunities on account of their sex. The Court further found, in Conclusion of Law No. 9, that Richardson's evidence established a prima facie case, that the class was discriminated against in hiring, transfer, promotion and job assignment, on the basis

of sex in violation of Title VII, and that, in Conclusion of Law No. 10, Defendants did not rebut Richardson's prima facie case, that Richardson and the Class she represents are entitled to injunctive relief against the Defendants designed to eliminate the Sheriff's Office unlawful employment practices on the basis of sex and the effects of past unlawful employment practices on the basis of sex. (Conclusion of Law No. 11). No injunction was ever entered.[2]

On October 12, 1979, the Court granted Respondent's Motion to Amend Findings of Fact and Conclusions of Law, allowing Plaintiff to present her back pay claim at the December hearing. See R. Vol. 1, p.89. The Court found that Richardson was entitled to attorney's fees to be set at a later hearing. (Conclusion of Law No. 12).

On December 3, 1979, a hearing was held where 63 applicants and five employees signed the requested claim forms from the Clerk. Six of the claimants testified about their claim. On May 30, 1980, the Court filed Findings of Fact and Conclusions of Law on class members finding a basis for relief for only Richardson, Terry Jewitt, an applicant, Josie Warren, an applicant, Debra Pullin, an employee and Carol Gassner, an employee, finding no basis for recovery for the other 63 of the 68 proposed class members. See R. Vol. II, pp. 230-245. Petitioners moved for a new trial but the motion was denied. See R. Vol. II, pp. 185-213, 218-219, 226-229.

On April 22, 1980, the Court denied Petitioner's Motion to Amend the Conclusions of Law and further found that deputies are appointed by the sheriff, (Tex.Rev.Civ.Stat.

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[2]The Court did, on April 6, 1982, order the Sheriff to keep records of transfers to and from the jail and to file a report of such transfers with the Clerk of the Court. Jurisdiction was retained until further orders of the Court.

Ann.art. 6769); the number of deputies to be appointed by the Commissioners Court, (Tex.Rev.Civ.Stat.Ann.art, 6869c); under the Texas Constitution, it is mandatory that the Commissioners Court compensate all deputy sheriffs, (Tex. Const.Art.16, Sec. 61) (Supp. 1980); that the Constitutional provision is reflected in State Statute, (Tex.Civ.Stat.Ann. art. 3902); that a sheriff's deputy *is* an "employee" within the meaning of Title VII; and that the Commissioners are "employers".

In August, 1980, Class Members, Carol Gassner and Debra Pullin, moved for injunctive relief based on claims of retaliation based on disciplinary actions brought against them.

On August 14, 1980, the Court filed Findings of Fact and Conclusions of Law denying injunctive relief. In Conclusion of Law No. 5, the Court concluded that there was serious doubt that any discipline procedures brought against either of them were based on retaliation or discriminatory motives. See R. Vol. II, pp. 291-293.

On October 2, 3 and 24, 1980, the Court heard evidence on the remedy phase as to the class members. It was continued until December 4, 1980, when it was concluded. On August 28, 1981, Petitioners moved the Court to reconsider the Class Certification and to decertify same on the basis that Respondent had not met the burden of proof required of her, that none of the class members had met the burdens of proof required of them, and for judgment for the Defendants (Petitioners) alleging that the Charge filed with the E.E.O.C. was limited to allegations of individual sex discrimination (in promotion) and same was jurisdictional to a class action. See R. Vol. II, pp. 321-327.

On February 1, 1982, the Motions were denied. See R. Vol. II, pp. 321-327. The Court held that "It is unclear whether

a federal district court is jurisdictionally barred from hearing discrimination claims beyond the scope of the E.E.O.C. Charge." The Court held that the question was not jurisdictional and Defendants had waived any complaint by not raising it earlier. The Court did not address the question raised in the Motion as to whether the Respondent had met the burden of proof as required by *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981). Petitioners had pointed out in the Motion that Respondent Richardson had failed to prove by a preponderance of the evidence that she applied for an available position for which she was qualified but was rejected under circumstances which gave rise to an inference of unlawful discrimination.

On February 1, 1982, the Court filed Findings of Facts and Conclusions of Law finding that applicants Jewitt and Warren were not hired as a result of sex based discrimination in accordance with Findings of Facts and Conclusions of Law filed May 30, 1980, and made findings as to compensation due them: Jewitt $3,317.65 and Warren $10,570.00. The Court also made findings as to compensation due deputies Richardson ($1,347.50), Pullin ($1.00) and Gassner ($2,320.25) as a result of sex based discrimination in accordance with the findings and conclusions filed May 30, 1982.

The Court also awarded attorney Linda Coffee $37,370.00, plus $512.67 in expenses, and attorney Joann Peters $2,864.00, plus $77.50 in expenses.

On March 16, 1982, the Court filed an order to reopen the trial to take evidence on paralegal fees. See R. Vol. II, pp. 380-381. A hearing was held on March 29, 1982, and on April 6, 1982, the Court entered Supplemental Findings of Fact and Conclusions of Law. See R. Vol. II, pp. 401-404. The Court awarded $6,312.50 for the paralegal work of

Elizabeth Fulbright, $795.00 for the paralegal work of Sherry Burdine,and $844.00 for paralegal work of Brenda Rice.

April 6, 1982, the Court entered a judgment in accordance with the findings and conclusions, and providing that the amounts awarded be recovered from Sheriff Don Byrd and the Defendant Members of the Commissioners Court of Dallas County, Texas. See R. Vol. II, pp. 405-406.

The Defendants appealed to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the district court's judgment in all respects except its award of attorneys' fees. The award of attorneys' fees was reversed and remanded to the district court for reconsideration in light of *Hensley v. Eckerhart*, ——U.S.—— 103 St. Ct. 1933, 75 L.Ed.2d — (1983).

The Complaint alleged jurisdiction pursuant to 28 U.S.C. § 1343(4); 42 U.S.C. § 2000-5(f), 42 U.S.C. § 2000-e, et seq. and 28 U.S.C. §§ 2201 and 2202.

The Fifth Circuit assumed jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING WRIT

A Writ of Certiorari should be granted to resolve the questions presented which concern whether the Fifth Circuit approved "across-the-board" rule will permit this Respondent former deputy sheriff who failed to show she was discriminated against, whose E.E.O.C. charge concerned only an individual complaint on promotion with no reference to applicants or a class and whose complaint omitted any reference to applicants, to be appointed as class representative of a class consisting of "all past, present and future female commissioned employees and all past, present and future

female applicants for commissioned employee positions at the sheriff's office who are, were, or continued to be limited, classified or discriminated against in ways which deprive or tend to deprive them of equal employment opportunities on account of their sex". R. Vol. I, p. 81.

The decision below is in direct conflict with the Third Circuit case of *Scott v. University of Delaware*, 601 F.2d 761 (3rd Cir. — 1979); the Fourth Circuit cases of *Abron v. Black and Decker*, 654, F.2d 951, (4th Cir. — 1981) and *Hill v. Western Electric Co., Inc.*, 596 F.2d 99 (4th Cir. — 1979) cert. den. 444 U.S. 929; and the Eighth Circuit cases of *Tuft v. McDonnel Douglas Corp.*, 581 F.2d (8th Cir. — 1978) and *Walker v. World Tire Corp., Inc.*, 563 F.2d 918 (8th Cir. — 1977); the Ninth Circuit case of *Chavez v. Tempe Union High School Dist. 213*, 565 F.2d 1087 (9th Cir. — 1977); nd the Tenth Circuit case of *Owens v. Rush*, 654 F.2d 1370 (10th Cir. — 1981). It is incorrect on that issue. Whether a district court may use an across-the-board approach to appoint a former deputy sheriff, who does not even claim to have been discriminated against in the hiring process and failed to prove discrimination in promotion and transfer practices to her and/or to the class, to represent a class of applicants and past, present and future deputy sheriffs in a class action suit, under 42 U.S.C. 2000-e, et seq., is a substantial and important federal question which has not been, but should be, settled by this Court.

Finally, the decision below is contrary to the decision of this Court in *Teamsters v. U.S.*, 431 U.S. 324 (1977), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, — L.Ed. — (1982) and *United States Postal Service Board of Governors v. Aikens*, ——U.S.——, 103 S.Ct. 1478 (1983), each of which held that

the plaintiff has the burden of proof on the question of discrimination.

There is a Conflict Among the Circuits

The across-the-board class used by the Fifth Circuit conflicts with other circuits. Most courts of appeal that have considered the issue held that a plaintiff employee who challenges an employer's discriminatory *promotion* practices may not represent a class complaining of discriminatory hiring practices because such claims are insufficiently similar. *Scott v. University of Delaware*, 601 F.2d 761 (3rd Cir. — 1979), *Hill v. Western Electric Co., Inc.*, 596 F.2d 99 (4th Cir. — 1979) cert. den. 444 U.S. 929, *Tuft v. McDonnell Douglas Corp.*, 581 F.2d 1304 (8th Cir. — 1978), *Walker v. World Tire Corp., Inc.*, 563 F.2d 918 (8th Cir. — 1977), *Chavez v. Tempe Union High School District 213*, 565 F.2d 1087 (9th Cir. — 1977).

The Tenth Circuit has held that a former undersheriff is not an employee within the meaning of 42 U.S.C. 2000-e, et seq., but was a member of the sheriff's personal staff. *Owens v. Rush*, 654 F.2d 1370 (1981). Respondent was a deputy sheriff who represented the sheriff in serving citations and other papers in a downtown Dallas district. Like in *Owens v. Rush*, supra, a deputy sheriff in Texas is not an employee within the terms of the County Civil Service Act. See Texas Atty. Gen. Opinion H-985 reproduced in Appendix C. The district court's order filed April 22, 1980, in Conclusions of Law, concludes that the "commissioners correctly point out that in Texas, deputies are appointed by the sheriff. See Tex. Rev. Civ. Stat. Art. 6869". The conflict is explicit and direct.

The Court should grant a writ of certiorari to resolve this conflict.

The Question is Substantial

This Court has not had an opportunity to review whether a former deputy sheriff who is not covered by civil service may properly be appointed to represent a class which includes applicants under the Fifth Circuit approved "across-the-board" rule. Without the Applicants, the numerosity requirement would not be met since there were only five employees involved in the making of claims. This question is important to Counties, nation wide, and the employees of the counties.[3]

The Decision Below is Incorrect

In view of this Court's holding in *East Texas Motor Freight Systems v. Rodriquez*, 431 U.S. 395, 97 S.Ct. 1891 (1977) that a class representative must be part of the class and possess the same interest and suffer the same injury as the class member, a former deputy sheriff who failed to meet her burden of proof under *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981) is an improper class representative. The *Burdine* burden applies since this is a disparate *treatment* case. On February 1, 1982, in Conclusions of Law entered by the District Court, Judge Hill concluded that the Defendants demonstrated through statistical and other evidence that there was no

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[3]Under the definition provided by statute, 42 U.S.C. §2000-e(f), [t]he term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff*, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the Constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State governmental agency or political subdivision. (Emphasis added)

intentional discrimination or discriminatory motive in employment against female applicants based on sex, and that there was no intentional discrimination or discriminatory motive in promotions based on sex. See R. Vol. II, pp. 356-358, Conclusions of Law 22, 23. Conclusion of Law 24 found that statistical information showed discrimination of deputies with less than five years service (but only where they are considered in a separate group from other females) in transferring out of the jail. But this does not apply to Respondent since she was transferred out of the jail ahead of 118 men. See p. 14 hereof. The only discrimination advanced by Richardson on which the Court found relief could be statistically supported, was her transfer claim, which was clearly a claim of disparate *treatment* as were all of the claims regarding the five class members who recovered. Therefore, the *Burdine* model regarding allocating burdens of proof is the correct standard by which this case should be reviewed, and under *Burdine*, Respondent failed to sustain said burden, while Petitioners carried their burden of production as to all claims against them.

A review of the "liability" phase of the trial below clearly shows that Respondent failed to carry her initial burden, therefore, the burden of production was never shifted to Petitioners. Nevertheless, Petitioners did present evidence to rebut Respondent's claims, as they did at each subsequent phase of the trial. It is insufficient for Respondent to simply show she made application for a job or a transfer and it was given to a male. The ultimate issue is discrimination vel non. *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478.

The Court of Appeals was erroneously of the opinion that the Petitioners were not challenging the Court's finding of class wide discrimination and, therefore, the Court held

that the *Burdine* burden did not apply. Under Statement of the Issues, the first issue included a clearly erroneous challenge to Conclusions of Law 8 - 11 made on September 18, 1979.[4]

The proof elicited by the County showed that the reason Richardson was downtown was, by her own admission, that she did the job better than anyone else had done. (Supplemental R. Vol. I, p.29, Hearing on Liability, Nov. 23, 1977). She did not show otherwise. Respondent Richardson made no claim that she suffered discrimination as an applicant and, therefore, lacks standing to complain of hiring practices, *Abron v. Black and Decker*, 654 F.2d 951, 955 (4th Cir.-1981).

The Court of Appeals also erroneously was of the opinion that "with consent of the parties, the District Court combined the class certification hearing with the liability phase of the suit". In fact, there was no Class Certification hearing by the District Court. At the hearing on Liability, Novem-

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[4] "*The Class Claims* — 8. This action should be certified as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class consists of all past, present, and future female commissioned employees and all past, present, and future female applicants for commissioned employee positions at the Sheriff's Office who are, were, or continue to be limited, classified, or discriminated against in ways which deprive or tend to deprive them of equal employment opportunities on account of their sex.

9. Richardson's evidence established a prima facie case that the class she represents was discriminated against in hiring, transfer, promotion and job assignment, on the basis of sex in violation of Title VII.

10. Defendants did not rebut Richardson's prima facie case.

11. Richardson and the class she represents are entitled to injunctive relief against the defendants designed to eliminate the Sheriff's Office unlawful employment practices on the basis of sex and the effects of past unlawful employment practices on the basis of sex.

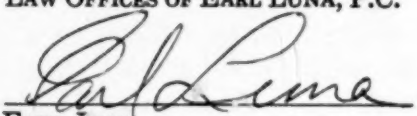
ber 23, 1977, p.6, 1. 10-15, the Court inquired of Respondent's attorney, "So at this time you're not seeking the class certification?" To which Respondent's attorney, Ms. Coffee, responded, "That's correct, Your Honor". Since the Complaint asked for a class action, when the Court made its Findings of Facts and Conclusions of Law some two years later on September 18, 1979, the Court apparently decided to certify the class even though Respondent was not requesting it and regardless of the fact that even the Complaint did not ask for applicants to be included in the class.

It is submitted that *General Telephone Company of the Southwest v. Falcon*, 102 S.Ct. 2364, is applicable to the facts of this case despite the Fifth Circuit's serious attempt to revitalize its "across-the-board" rule in its Opinion in this case by holding that "the concerns of *Falcon* were met when the proof surfaced an accused employment *practice* that adversely affected her and the certified class of employees and applicants" even though Respondent was not and did not claim to be discriminated against as an applicant and was once the beneficiary of the subjective factors by being promoted ahead of 118 other deputy sheriffs. Hearing on Liability, November 23, 1977, p.69-71. If the subjective decisions were discrimination, having benefited by them, her interest was different from other members of the class. The error in the across-the-board rule applied here is the failure to evaluate carefully the legitimacy of the named Plaintiff's plea that she is a proper class representative under Rule 23. The lower Court's refusal to acknowledge applicable federal law and decisions of this Court are so erroneous as to call for correction by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
LAW OFFICES OF EARL LUNA, P.C.



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ATTORNEY FOR PETITIONERS

PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners herein in all proceedings in which they have been involved as named parties in the Courts below.

I further state upon oath that upon the 10th day of October, 1983, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Ms. Linda Coffee, Palmer, Palmer, Coffee and Bush, 840 One Main Place, Dallas, Texas 75250, Attorney for Respondent Marsha Richardson, et al., to Ms. Joann Peters, 401 Stemmons Tower West, 2730 Stemmons Freeway, Dallas, Texas 75207, Attorney for Respondent Carol Gassner, and to Ms. Sue LaGarde, Assistant District Attorney, 9th Floor, Dallas County Courthouse, Dallas, Texas 75202, on this 10th day of October, 1983.

Earl Luna

EARL LUNA

SUBSCRIBED and SWORN To before me by the said Earl Luna, this the 10th day of October, 1983.

Notary Public
Dallas County, Texas

APPENDIX

Marsha A. RICHARDSON, Plaintiff-Appellee Cross-Appellant,

and

Darlyn Kay Copeland and Carol Gassner, Plaintiffs-Appellees,

v.

Don BYRD, Sheriff, Etc., Defendant-Appellee,

and

Commissioners Court of Dallas County, et al., Defendants-Appellants Cross-Appellees.

No. 82-1220.

United States Court of Appeals, Fifth Circuit.

July 22, 1983.

Title VII sex discrimination class action was filed against county commissioners court and county sheriff's office, alleging discrimination on account of sex in employment practices. The United States District Court for the Northern District of Texas, Robert M. Hill, J., entered judgment in favor of plaintiffs, and appeal and cross appeal were taken. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) female deputy demonstrated sufficient nexus to enable her to represent class consisting of both sheriff's office employees and applicants for employment; (2) female deputy was proper representative of class at time of certification, notwithstanding that she no longer worked in jail at such time; (3) findings that plaintiffs were entitled to back pay were not clearly erroneous; (4) attorney's fee award had to be vacated and remanded to provide opportunity to resolve inquiry as to relationship between extent of plaintiffs' success and amount of fee award; (5) assignment of hourly

value to work hours performed by paralegals rather than allowing reimbursement for salaries paid in awarding attorney's fees to paralegals was not abuse of discretion; and (6) refusal to compensate successful plaintiff for loss of personal use of official county automobile was not clear error.

Affirmed in part; vacated and remanded in part.

1. Federal Courts — 817

Definition of class is reviewable only for abuse of discretion. Fed.Rules Civ. Proc. Rule 23, 28 U.S.C.A.

2. Federal Civil Procedure — 173

Under class action rule, district court is charged with duty of monitoring its class decisions in light of evidentiary development of case; district judge must define, redefine, subclass, and decertify as appropriate in response to progression of case from assertion to facts. Fed.Rules Civ. Proc.Rule 23, 28 U.S.C.A.

3. Federal Courts — 817

Class certification decisions must be protected by level of review that accords substantial discretion. Fed.Rules Civ. Proc. Rule 23, 28 U.S.C.A.

4. Federal Civil Procedure — 184

Female deputy demonstrated sufficient nexus to enable her to represent class consisting of both sheriff's office employees and applicants for employment where one of practices attacked involved assignment of all new female deputies to jail and restriction on their transfer to more desirable sections, section of jail available for females was smaller than male section and therefore sheriff's policy by necessity limited number of female deputies that could be employed by sheriff's office, and thus both applicants and employees were adversely affected by same practice Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S. C.A. § 2000e et seq.; Fed.Rules Civ.Proc. Rule 23(a), 28 U.S.C.A.

5. Federal Civil Procedure — 184

Female deputy was proper representative of class consisting of both sheriff's office employees and applicants for employment, notwithstanding that, at time of class certification, female deputy no longer worked in jail and was suing sheriff for not transferring her from civil division while her sex discrimination claim involved issues of law or fact common to both applicants and employees assigned to jail, where evidence showed that sheriff's employment practices were infected by entirely subjective decision-making processes whose impact might be sufficient to connect otherwise differently situated persons, and proof showed employment practice that adversely affected deputy and certified class of employees and applicants. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed. Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

6. Civil Rights — 43, 46

In relfief phase of Title VII class action, individual claimant, to be entitled to back pay, has only to identify position she was denied because of discrimination and present estimation of amount of requested back pay, and employer then has burden of proving that individual claimant was denied employment opportunity for legitimate reasons. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S. C.A.

7. Civil Rights — 44(1)

Findings that claimants, who were respectively told that hair would have to be cut before consideration for employment, told to return to teaching job or become a secretary, removed from court runner desk because male deputy was desired for position, removed from position because of pregnancy, and denied transfer under belief that it was good public relations to have "pretty woman" working in downtown district, were entitled to back pay in Title VII sex discrimination action were not clearly erroneous. Civil Rights

Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ. Proc.Rule 23, 28 U.S.C.A.

8. Civil Rights — 13.7, 41

United States Supreme Court's *Monell* decision had no bearing on whether county commissioners were "employers" under Title VII and thus liable for sheriff's discriminatory employment practices but, rather, identified when municipality could be held liable under federal statute governing civil action for deprivation of rights. 42 U.S.C.A. § 1983.

9. Federal Courts — 939

Where court below did not properly consider relationship between extent of claimants' success and amount of fee award in determining whether award of attorneys' fees to sex discrimination claimants should be reduced by eliminating compensation for work expended on unsuccessful claims, fee award would be vacated and cause remanded for opportunity to resolve such inquiry. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

10. Civil Rights — 46

Award of attorneys' fees to class representative's personal attorney was not error where, after representative's personal attorney began work, class counsel did no more work on class representative's behalf. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. Fed. Rules Civ.Proc.Rule 23, 28 U.S.C.A.

11. Civil Rights — 46

Finding of portion of work performed by paralegals which represented work traditionally performed by attorneys was not clear error for purpose of award of attorneys' fees to paralegals, who assisted lawyers at trial, organized and reviewed class members' claims, participated in telephone conferences with lawyers, witnesses, and class members, and performed complex statistical work Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

12. Civil Rights — 46

In light of paralegals' expertise, assignment of hourly value to paralegals' work hours rather than allowing reimbursement for salaries paid in awarding attorneys' fees to paralegals was not abuse of discretion. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

13. Civil Rights — 46
Federal Courts — 871

Refusal to compensate female deputy, who was successful on sex discrimination claim, for loss of personal use of official county automobile was not clear error, notwithstanding sheriff's somewhat ambiguous deposition testimony as to allowance of reasonable personal use of automobile, where two veteran deputies testified that sheriff's office had long prohibited personal use of county vehicles and that county automobiles were not given to deputies to supplement their salaries. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Federal Courts — 772

Absent timely cross appeal, former female deputy's request for additional relief, claiming that she was discharged in retaliation for her sex discrimination suit, was not before Court of Appeals. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Earl Luna, Dallas, Tex., for Com'rs Court.

Sue Lagarde, Asst. Dist. Atty., Dallas, Tex., for Sheriff Byrd.

Linda N. Coffee, Dallas, Tex., for class.

Clifton, L. Holmes, Kilgore, Tex., for Darlyn Kay Copeland.

Joann Peters, Dallas, Tex., for Carol Gassner.

Appeals from the United States District Court for the Northern District of Texas.

Before INGRAHAM, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This Title VII sex discrimination class action was filed by Marsha Richardson against the Dallas County Commissioners Court and the Dallas County Sheriff's Office alleging discrimination on account of sex in employment practices. The Commissioners, Richardson, and one other class member here contest the findings of liability and the relief granted by the district court. We affirm the district court's judgment in all respects except its award of attorneys' fees. We remand that award to the district court for reconsideration in light of a decision of the Supreme Court handed down while the case was before this panel.

After exhausting administrative prerequisites, Richardson filed on behalf of herself and a class of female applicants and employees a Title VII suit against the Dallas County Commissioners Court and Sheriff Clarence Jones alleging sex discrimination in the transfer and promotion of employees of the Sheriff's department.[1] With consent of the parties, the district court combined the class certification hearing with the liability phase of the suit. After trial the district court held that Richardson was denied a transfer to an "outside" district of the Civil Division of the Dallas County Sheriff's Office because of her sex. It also certified a class of past, present, and future employees and applicants pursuant to Fed.R.Civ. 23(b) (2) and held that this class "was discriminated against in hiring, transfer, promotion, and job assignment in violation of Title VII."

Notice of these findings then was sent to over 1000 members of the putative class. Of these 1000, twenty-seven testified at a series of hearings. On May 30, 1980, the district court determined that two of twenty-one applicants, Terry Jewett and Josie Warren, and three of six employees, Rich-

[1]Carl Thomas replaced Clarence Jones as Sheriff in January, 1977. Don Byrd replaced Thomas in January, 1981.

ardson, Debra Pullin, and Carol Gassner, were entitled to backpay or other relief. After holding several more hearings, the district court awarded backpay and other relief to these five claimants and enjoined the Sheriff's Office from continuing its practice of assigning proportionately more female than male deputies to the jail. It also awarded $37,370 to Richardson's attorney, $2864 to Gassner's attorney, and $7951 to three paralegals found to be "performing work that has traditionally been done by an attorney." At the same time, the court concluded that disciplinary procedures brought against Gassner and Pullin had not been based on retaliatory motives growing out of their suit. It also rejected Richardson's claim for the value of the use of a county car, holding that "the record fully supports the Court's findings that it was the policy of the Sheriff's Office from 1973 to the present that county vehicles could not be used by deputy Sheriffs in their personal business."

The court entered judgment on April 6, 1982. The Commissioners now appeal, arguing that the district court erred in certifying the class, in finding that the five claimants were entitled to relief, and in awarding attorneys' fees. Richardson cross-appeals, contending that the court erred in denying the additional relief requested. While Gassner does not characterize herself as a cross-appellant, she also seeks additional relief.

Class Certification

[1-3] The definition of a class is reviewable only for abuse of discretion. Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts. We recognize that these complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people. It follows that class certification decisions must be protected by a level of review that accords substantial discretion. At the same time we keep in mind that while

Rule 23 is not self defining and employs sometimes internally overlapping indexes, it is, nonetheless, a rule with limits both internal to the rule and without. In this spirit of reviewing a trial court decision due substantial discretion we turn to this case.

The Commissioners first argue that the district court abused its discretion in certifying a class consisting of "all past, present, and future female commissioned employees and all past, present, and future female applicants for commissioned employee positions at the Sheriff's Office." Citing *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), they contend that Richardson, an employee, is not permitted to maintain a class action on behalf of applicants whom the Sheriff did not hire.[2] We do not so read *Falcon*. We are persuaded that the Supreme Court did not intend that Rule 23 be administered in such a categorical fashion.

In *Falcon*, the Supreme Court reminded that a proposed class of persons seeking relief under Title VII must meet the requirements of Rule 23, underscoring the request that "the class claims [be] those fairly encompassed by the named plaintiff's claims." *Id.* at 2370. The Court found that the proposed class representative there did not meet these requirements because his complaint provided an insufficient basis for the trial court to conclude that adjudication of his claim of discrimination in *promotion* would require the decision of any question of law or fact common to assertedly discriminatory *hiring* practices. *Id.* at 2371.[3] The class repre-

[2]We reject the class's argument that the Commissioners did not raise this argument below. In a March 7, 1980 motion, the Commissioners argued that "[t]he Court erred in defining the class the plaintiff sought to represent by including applicants as part of the class when the Complaint limits the class sought to be represented to female deputies."

[3]While the Court relied on the class representative's complaint to determine the proper scope of the class, the facts relevant to this determination may emerge from other sources. In *Falcon*, the complaint provided the only basis for this determination because the district court had certified the class without conducting an evidentiary hearing.

sentative was found to have not alleged sufficient facts to support an "across-the-board" attack. But the court did not translate that found deficiency to a holding that employees never can represent applicants or that an across-the-board class is never appropriate. Instead, it noted:

> If petitioner used a bias testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination.

Id. at 2751 n. 15 (emphasis in original).

[4] Unlike the disapproved class representative in *Falcon*, we find that Richardson demonstrated a sufficient Rule 23(a) nexus to enable her to represent a class consisting of both employees and applicants. One of the Sheriff's practices that Richardson attacked involved the assignment of all new female deputies to the jail and a restriction on their transfer to more desirable sections. Because the section of the jail available for females was smaller than the male section, the Sheriff's policy by necessity limited the number of female deputies that could be employed by the Sheriff's Office. As such, both applicants and employees were adversely affected by the same practice.

[5] While this connection between employees assigned to the jail and job applicants is plainly sufficient to support a class of both, the question remains whether Richardson at the time of class certification was a proper representative

of that class. At the time of class certification Richardson no longer worked in the jail and was suing the Sheriff for not transferring her from the Civil Division. Yet, her claim involved issues of law or fact common to those of applicants and employees assigned to the jail. Evidence at the Phase I trial showed that the Sheriff's employment practices were infected by the "entirely subjective decision-making processes" recognized in *Falcon* as a manifestation of policy whose impact might be sufficient to connect otherwise differently situated persons. The district court found that "[t]he Sheriff's Office had no established seniority or merit system to determine eligibility for transfer of promotion. Nor did it have written guidelines for promotion or transfers. Instead, promotions and transfers were determined by the supervisors, almost all of whom were male, based largely on subjective factors." This finding demonstrates that "discrimination in its broadest sense" was *not* the only claim common to Richardson and the class she sought to represent. *Compare Wheeler v. City of Columbus*, 703 F.2d 853 (5th Cir. 1983). The concerns of *Falcon* were met when the proof surfaced an accused employment *practice* that adversely affected her and the certified class of employees and applicants. *See Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir.1983) (custodial workers held to be proper class representatives of clerical workers since both were affected by subjective job assignment procedures). The district court did not err in certifying this class.[4]

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[4]The Commissioners also seem to argue that the class claim is barred because of Richardson's failure to complain to the EEOC of classwide discrimination. We recently rejected this argument in *Fellows v. Universal Restaurants*, 701 F.2d 447, 451-52 (5th Cir. 1983), holding that a class action may be based upon an EEOC complaint of individual discrimination as long as an "EEOC investigation of class discrimination against women could reasonably be expected to grow out of [the] allegations in [the] initial EEOC charge." The Commissioners have made no showing that such an investigation could not have grown out of Richardson's EEOC charge.

Entitlement to Backpay

The Commissioners also urge that even if the class was properly certified, the five claimants did not sustain their burden of proving an entitlement to backpay. Relying on *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), they contend that they "produced credible evidence against each point on which each prevailing class member was granted an award" and that this evidence was not rebutted by the class members. We reject this argument.

[6] This reliance upon *Burdine* is misplaced. The burden of proof imposed on the plaintiff in the liability phase of a Title VII class action, termed Phase I, differs from that imposed in the relief phase, termed Phase II. In this case, the district court found class wide sex discrimination in Phase I. The Commissioners do not now challenge this ruling. Instead, they argue that the individual claimants did not meet their *Burdine* burden of proving an entitlement to backpay. *Burdine*, however, does not control in Phase II. At the start of a Phase II trial the employer faces a prior adjudication of class discrimination. The procedures thereafter assume that fact and are calculated to identify the individual claimant's to the condemned practices without a second trial of the issue of class discrimination. That *Burdine* is inapposite is plain. The *individual* claimant must only identify the position she was denied because of discrimination and present an estimation of the amount of requested backpay. *See Teamsters v. United States*, 431 U.S. 324, 362, 97 S.Ct. 1843, 1868, 52 L.Ed.2d 396 (1977); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1212-13 (5th Cir. 1978) (*quoting Pettway III*, 494 F.2d 211, 259-60 (5th Cir. 1974)). Contrary to the Commissioners' argument, the employer then has the burden of *proving* that the individual claimant was denied an employment opportunity for legitimate reasons. *Teamsters*, 431 U.S. at 362, 97 S.Ct. at 1868; *Pettway*, 576 F.2d at 1213.

[7] A second problem with the Commissioners' argument is that it ignores the "clearly erroneous" standard for re-

viewing the district court's determination that five claimants were entitled to backpay. See *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). We have reviewed the findings in light of the Commissioners' attack but we cannot conclude that any of these findings are clearly erroneous. We turn to each in turn.

Terry Jewett — After passing the requisite tests, Jewett was told she would have to cut her hair *before* she would be considered for employment. She refused and was not offered a job. While defendants introduced evidence of a dress code that required short hair for all officers, they did not prove that male applicants also were required to cut their hair before being considered for employment. Jewett, in fact, testified that she would have cut her hair to the prescribed length if she had been hired.

Josie Warren — After passing the requisite tests, Warren appeared before a Review Board attended by Sheriff Thomas. Warren's unrebutted testimony was that Thomas advised her to return to her teaching job or to become a secretary. He also asked whether her husband would permit her to work rotating shifts. Finally, he warned her that she would be working in the jail with dangerous criminals and ordered her to choke and handcuff a male deputy.

Debra Pullin — Hired in 1973, Pullin worked on the court runner desk for two weeks until she was transferred. Rejecting defendants' attacks on her job performance, the district court concluded that Pullin was removed from the court runner desk because her supervisor wanted a male deputy in the position.

Carol Gassner — Hired in 1974, Gassner was removed from her position on the court runner desk in 1975, was removed from a position at Parkland Hospital in 1976 because she was three months pregnant, was not allowed to adjust her midnight shift to secure child care, and was denied a transfer to the Warrant Division in 1978. Defendants offered proof that Gassner was a "continual complainer" but were otherwise unable to show that their employment decisions were unrelated to her sex.

Marsha Richardson — The court's finding that Richardson was discriminatorily denied a transfer to an outside district is not clearly erroneous. The supporting evidence included testimony that Sheriff Jones believed it was good public relations to have a "pretty woman" working in the downtown district.

[8] Backing away from their attack against the successful claimants, the Commissioners suggest that because they adopted an affirmative action plan, any discriminatory employment decision by the Sheriff could not be the official policy or custom of Dallas County and that they thus cannot be held liable under *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). This argument is without merit. *Monell* identifies when a municipality may be held liable under 42 U.S.C. § 1983; it has no bearing on whether the Commissioners are "employers" under Title VII and thus liable for the Sheriff's employment practices. The Commissioners do not now challenge the district court's conclusion that they are "employers" under Title VII.

Attorneys' Fees

The Commissioners launch three attacks against the court's award of attorneys' fees of Richardson and Gassner. First, they claim that the award should be reduced by eliminating compensation for work expended on unsuccessful claims, which included a harrassment charge by Richardson and the backpay awards sought by all but five of the class members. The Supreme Court recently addressed this issue in *Hensley v. Eckerhart*, ——U.S.——, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), holding that a district court must address two questions in determining whether a partially prevailing plaintiff may recover attorneys' fees for legal services on unsuccessful claims: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* at , 103 S.Ct. at 1940. While noting that the district court there had properly resolved the first

inquiry in favor of the plaintiffs, the Court vacated the fee award "because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award." *Id.* at ——, 103 S.Ct. at 1942 (footnote omitted). More specifically,

> [t]he court's finding that "the [significant] extent of the relief clearly justifies the award of a reasonable attorney's fee" does not answer the question of what is "reasonable" in light of that level of success. We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

Id. (footnote omitted).

[9] Though we acknowledge the district court's discretion in determining a proper fee award, we are mindful of the Supreme Court's admonition that [t]his discretion . . . must be exercised in light of the considerations" identified in *Hensley*. *Id.* at ——, 103 S.Ct. at 1941. The district court here answered the first question posed by *Hensley*, holding that "the hours expended [by the lawyers] were necessary in the prosecution of this action on behalf of their clients, except for 19 hours expended . . . in an unsuccessful attempt to have Pullin's 5 day suspension in August 1980 set aside, and except for 20.3 hours expended . . . in an unsuccessful effort to have Gassner reinstated. . . ." Nevertheless, like the district court in *Hensley*, the court below "did not properly consider the relationship between the extent of success and the amount of the fee award." Thus, we vacate the fee award and remand to provide the court an opportunity to resolve the second *Hensley* inquiry.[5]

[10] Despite this disposition, we address the Commissioners' remaining contentions now in the interest of judicial economy. First, the Commissioners assert that the attorneys'

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[5] In doing so we do not suggest that the able district court misapplied the law as it then existed. This is a post-decision development.

fees sought by Gassner's lawyer should not be awarded because Gassner already was represented by class counsel. The record, however, does not support this charge of duplication. Gassner obtained her own lawyer to contest her July 23, 1980 discharge. After the lawyer began work on July 29, the class counsel did no more work on Gassner's behalf. The district court thus did not err in awarding attorneys' fees to Gassner's lawyer.

[11, 12] The Commissioners' final attack is against the district court's award of attorneys' fees to three paralegals. Initially, the court refused to make such an award because the class had not shown that any of the paralegals had performed work "that has traditionally been done by an attorney." *See Jones v. Armstrong Cork Co.*, 630 F.2d 324, 325 & n. 1 (5th Cir. 1980). It then reopened the evidence and awarded fees to three paralegals in amounts ranging from $30 to $50 per hour. The Commissioners now contend that the paralegals were not entitled to these awards because: (1) they were not performing the work of attorneys; and (2) they were being paid less than $30-$50 per hour. Both arguments are without merit. The record shows that the three paralegals assisted the lawyers at trial, organized and reviewed class members' claims, participated in telephone conferences with lawyers, witnesses, and class members, and performed complex statistical work. The district court carefully determined what portion of this work could have been performed by secretarial personnel and then awarded attorneys' fees for the remaining portion. We cannot conclude that the court clearly erred in finding that that portion represented work traditionally performed by attorneys. In light of the paralegals' expertise, the court also did not abuse its discretion in assigning an hourly value to the work hours rather than allowing reimbursement for salaries paid. *See Jones v. Armstrong Cork Co.*, 630 F.2d at 325 n. 1. Nevertheless, we note that this award also must be reconsidered in light of *Hensley*.

Richardson's Cross-Appeal

The district court awarded Richardson transportation and parking expenses but refused to compensate her for the loss of personal use of an official county automobile that is assigned to deputies in outside districts. The court reasoned that any personal use of an official car would have contravened the official policies of the Sheriff's Office. Richardson then moved to amend the finding of facts, arguing that this policy did not become official until one year after her resignation in May, 1975. The court denied this motion on the ground that the same policy had existed since at least 1973. Richardson now cross-appeals, contending that the court's finding of an official policy from 1973-75 is clearly erroneous in light of Sheriff Jones's testimony that reasonable personal use was permitted.

[13] Despite Sheriff Jones's somewhat ambiguous deposition testimony, two veteran deputies, Charles Player and James Grandstaff, testified that the Sheriff's Office had long prohibited the personal use of county cars and these cars were not given to deputies to supplement their salaries. Based on this testimony, we cannot conclude that the district court here clearly erred.

Gassner's Claim

The district court rejected Gassner's claim that she was discharged in retaliation for her sex discrimination suit, ruling that the reason for her discharge was her refusal to cooperate with an investigation regarding a stolen rifle. She now argues that the district court should have applied *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) to her retaliatory discharge claim, thus affording her a "presumption" that the discharge was improperly motivated.

[14] We do not reach the merits of this claim because we find that it is not properly before us. On May 14, 1982, Gassner filed notice of her cross-appeal. One month later, this

court granted defendants' motion to dismiss the cross-appeal as untimely filed. Despite this ruling, Gassner filed a brief reiterating the class's positions and raising this claim for additional relief. The Commissioners moved to strike that portion of the brief. In response, Gassner argues that Richardson's cross-appeal was timely filed on behalf of the entire class. We disagree. Richardson's notice of cross-appeal was filed on her own behalf. Absent a timely cross-appeal, Gassner,'s request for additional relief thus is not before us.

For the reasons stated above, we affirm the judgment in all respects but remand for reconsideration of the attorneys' fee award in light of *Hensley v. Eckerhart.*

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 82-1220

D. C. Docket No. CA-3-75-0282-D

Marsha A. RICHARDSON, Plaintiff-Appellee Cross-Appellant,
and
Darlyn Kay Copeland and Carol Gassner, Plaintiffs-Appellees,
v.
Don BYRD, Sheriff, Etc., Defendant-Appellee,
and
Commissioners Court of Dallas County, et al., Defendants-Appellants Cross-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before INGRAHAM, WILLIAMS AND HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that Defendants-Appellants pay to the Plaintiff-Appellee the costs on appeal, to be taxed by the Clerk of this Court.

July 22, 1983

In The

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARSHA A. RICHARDSON, ET AL,
Plaintiffs
v.
CLARENCE JONES, ET AL,
Defendants

CIVIL ACTION NO. CA-3-75-0282-D

JUDGMENT

This action came on for trial before the Court, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the following plaintiffs recover the following sums of the defendant Don Byrd, in his official capacity as Sheriff of Dallas County, Texas, the defendant Gary Weber, in his official capacity as County Judge of Dallas County, Texas, and the defendants Nancy Judy, Jim Jackson, Jim Tyson and Roy Orr, in their official capacities as members of the Commissioner's Court of Dallas County, Texas:

(a) Marsha Richardson the sum of $1,347.50, with interest at the rate of 9% per annum from May 20, 1975, until paid;

(b) Marsha Richardson as class representative for the use and benefit of her attorney th[illegible] sum of

$44,990.17 as attorney's fees and expenses with interest at the rate of 9% per annum from date hereof until paid;

(c) Terry Jewett the sum of $3,317.65, with interest at the rate of 9% per annum from December 3, 1979, until paid;

(d) Josie Warren the sum of $10,750, with interest at the rate of 9% per annum from May 1, 1980, until paid;

(e) Debra Pullin the sum of $1, with interest at the rate of 9% per annum from date hereof until paid;

(f) Carol Gassner the sum of $2,321, with interest at the rate of 9% per annum from April 30, 1970, until paid; and

(g) Carol Gassner for the use and benefit of her attorney the sum of $4,657.50, as attorney's fees and expenses, with interest at the rate of 9% per annum from the date hereof until paid;

and defendants shall pay said sums from any funds of Dallas County in their custody or under their control;

It is further ORDERED and ADJUDGED that defendant Don Byrd, and/or his successor in office, shall hereafter maintain accurate records reflecting transfers to and from the Dallas County Jail by sex of deputies with less than five years of service and 180 days after the date hereof he shall file a report of all such transfers with the Clerk of this Court; such records shall be open at reasonable times for inspection by counsel for the class plaintiffs; and

It is further ORDERED and ADJUDGED that jurisdiction over this action will be retained until further order of this Court.

Dated at Dallas, Texas, on this 6th day of April, 1982.

United States District Judge

SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so en-

gaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or

international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an em-

ployer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95 598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679.

§ 2000e-2. Unlawful employment practices
Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for emploment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if —

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for

an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred

or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a),(b), Mar. 24, 1972, 86 Stat. 109.

§ 2000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, of an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment

by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Pub.L. 88-352, Title VII, § 704, July 2, 1964, 78 Stat. 257; Pub.L. 92-261, § 8(c), Mar. 24, 1972, 86 Stat. 109.

§ 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commis-

sion, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon

which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal

proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hunderd and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United

States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges

was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have

worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without

back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section

shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.

Constitution Art 16,

§ 61. Compensation of district, county and precinct officers; salary or fee basis; disposition of fees

Sec. 61. All district officers in the State of Texas and all county officers in counties having a population of twenty thousand (20,000) or more, according to the then last preceding Federal Census, shall be compensated on a salary basis. In all counties in this State, the Commissioners Courts shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts, to compensate all justices of the peace, constables, deputy constables and precinct law enforcement officers on a salary basis beginning January 1, 1973; and in counties having a population of less than twenty thousand (20,000), according to the then last preceding Federal Census, the Commissioners Courts shall also have the authority to determine whether county officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts to compensate all sheriffs, deputy

sheriffs, county law enforcement officers including sheriffs who also perform the duties of assessor and collector of taxes, and their deputies, on a salary basis beginning January 1, 1949.

All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is compensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners Court may direct. All Notaries Public, county surveyors and public weighers shall continue to be compensated on a fee basis.

Amended Nov. 7, 1982.

Art. 6869. [7125] [4896] May appoint deputies, etc.

Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of their principals; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the official oath, which shall be indorsed on his appointment, together with the certificate of the officer administering the same; and such appointment and oath shall be recorded in the office of the County Clerk and deposited in said office. The number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the Justice precinct in which is located the county site of such county, and one in each Justice precinct, and a list of these appointments shall be posted up in a conspicuous place in the Clerk's office. An indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff. Provided further, that if in the opinion of the Commissioners' Court fees of the sheriff's

office are not sufficient to justify the payment of salaries of such deputies, the Commissioners' Court shall have the power to pay the same out of the General Fund of said county. Acts 1889, p. 23; G.L. vol. 9, p. 1051; Acts 1929, 41st Leg., 1st C.S., p. 283, ch. 113, § 1.

Art. 6869c. Number of deputies in counties of 197,000 or over

In counties having a population in excess of one hundred ninety seven thousand five hundred (197,500) according to the last preceding Federal Census, the provisions of Article 6869, Revised Civil Statutes of Texas, of 1925, as amended, insofar as such limits the number of deputies allowable to sheriffs shall not apply, but the sheriff in any such county shall have the number of deputies allowed him by the Commissioners' Court of such county. Acts 1934, 43rd Leg., 2nd C.S., p. 121, ch. 56, § 1.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish

incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, includ-

ing individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate

therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

The Honorable Henry Wade
Criminal District Attorney
Dallas County
Sixth Floor, Records Building
Dallas, Texas 75202

Opinion No. H-985
Re: Applicability of civil service laws to employment of deputy sheriffs.

Dear Mr. Wade:

You have requested our opinion concerning the applicability of the County Civil Service Act, article 2372h-6, V.T.C.S., to deputy sheriffs in Dallas County. In counties adopting a civil service system under the Act, a civil service commission is authorized to make and enforce rules relating to selection, promotion, discipline, and dismissal of employees, as well as other matters pertaining to employment and working conditions. V.T.C.S. art. 2372h-6, § 8. The County Civil Service Act applies to employees, defined to include

> any person who obtains his position by appointment and *who is not authorized by statute to perform governmental functions in his own right involving some exercise of discretion* . . . .

V.T.C.S. art. 2372h-6, § 1(3). (Emphasis added). The underlined language excludes from the operation of the Act one who (a) performs governmental functions, (b) in his own right, (c) involving some exercise of discretion. *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974). In construing that language, the Supreme Court also relied on a definition of employee which it had used to distinguish "employee" from "officer" in interpreting article 16, section 30 of the Constitution. *See Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955). One's status as an officer is determined by "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *Green v. Stewart, supra*, at 135. Our task is to determine whether a deputy sheriff is an employee as defined by article 2372h-6, V.T.C.S., and the Supreme Court in construing that Act.

Article 6869, enacted prior to the County Civil Service Act, describes the powers of deputy sheriffs and provides for their appointment and termination:

> Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, *who shall have power and authority to perform all the acts and duties of their principals;* and every person so appointed shall before he enters upon the duties of his office, take and subscribe to the official oath....

(Emphasis added). A deputy sheriff is "a public officer invested by law with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." *Rich v. Graybar Electric Co.*, 84 S.W.2d 708 (Tex. 1935); *Murray v. State*, 67 S.W.2d 274 (Tex. Crim. App. 1933); *see also Murray v. Harris*, 112 S.W.2d 1091 (Tex. Civ. App. — Amarillo 1938, writ dism'd). We believe that case law clearly makes the deputy sheriff an officer.

We also believe that he performs "governmental functions in his own right involving some exercise of discretion" and thus is not an employee within the terms of article 2372h-6, V.T.C.S. He is "invested by law with some portion of the sovereign functions of the government." *Murray v. State, supra* at 276. The Code of Criminal Procedure imposes on him many duties that require him to exercise discretion and act independently of the control of the sheriff. *See e.g.* Code Crim. Proc. arts. 2.12, 2.13, 2.14, 2.17, 2.18, 2.20, 14.01.

The deputy sheriff performs governmental functions in his own right, and not in the right of the sheriff. In *Green v. Stewart*, the deputies appointed "to assist" the tax assessor-collector did not act in their own right. A deputy sheriff, however, does not merely assist the sheriff, but has statutory authority to perform all of his duties. *See Naill v. State*, 129 S.W. 630 (Tex. Crim. App. 1910). His duties are assigned him by statute, and not by delegation from the sheriff. *See Pfeffer v. Mahnke*, 260 S.W. 1031 (Tex. 1924);

Attorney General Opinion H-619 (1975). The sheriff cannot in fact limit his statutorily authorized duties and powers. *Trammel v. Shelton*, 45 S.W. 319 (Tex. Civ. App. 1898, no writ). Although some of the deputy's official acts must be done in the sheriff's name, he can convey property under his own name following an execution sale. *Compare Herndon v. Reed*, 18 S.W. 665 (Tex. 1891) *and Miller v. Alexander*, 13 Tex. 497 (1855) *with Cortimiglia v. Miller*, 326 S.W.2d 278 (Tex. Civ. App. — Houston 1959, no writ); *see also* Attorney General Opinion O-5394 (1943).

We are aware that some courts have defined "deputy" as one "who exercises an office in another's right." *Sanchez v. Murphy*, 385 F. Supp. 1362 (D. Nev. 1974); *Trammell v. Fidelity & Casualty Co. of New York*, 45 F. Supp. 366 (E.D. S.C. 1942); *Halter v. Leonard*, 122 S.W. 706 (Mo. 1909). We have not found any case in which a Texas court has adopted this definition of deputy, and we do not believe it applies to a deputy sheriff in Texas. The Texas courts have instead emphasized that the deputy is the sheriff's alter ego. *Heye v. Moody*, 4 S.W. 242 (Tex. 1887); *Bigham v. State*, 148 S.W.2d 835 (Tex. Crim. App. 1941). In any case, judicial definitions of "deputy" in statutes governing other offices do not necessarily apply to the deputy sheriff, who holds a common law office and whose role is to some extent defined by case law, of which statute is merely declaratory. *Rich v. Graybar Electric Co., supra; Blackburn v. Brorein*, 70 So. 2d 293 (Fla. 1954). We conclude that deputy sheriffs are not employees within the terms of the County Civil Service Act. Our opinion is consistent with the decisions of courts in other states that deputies with duties equal to the sheriff's are not covered by civil service regulations. *Blackburn v. Brorein, supra; Amico v. Erie County Legislature*, 321 N.Y.S.2d 134 (App. Div. 1971). *See* 15A Am. Jur.2d. Civil Service § 15; 70 Am. Jur.2d, Sheriffs, Police and Constables § 2. In reaching this conclusion, we have considered only those deputies vested with governmental functions. We have not considered appointments like those made by the county tax assessor-collector in *Green v. Stewart*, who deputized all employees in his office, including typists and file clerks.

We need not answer your remaining questions, which were premised upon a finding that the County Civil Service Act applies to deputy sheriffs. Attorney General Opinion M-1088 (1972) is hereby overruled to the extent inconsistent with this opinion.

SUMMARY

The County Civil Service Act, article 2372h-6, V.T.C.S. does not apply to deputy sheriffs.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

kml

NO. 83-597

In the Supreme Court of the United States

OCTOBER TERM, 1983

DALLAS COUNTY COMMISSIONERS COURT, ET AL.,

PETITIONERS

VERSUS

MARSHA RICHARDSON, ET AL.,

RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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PETITIONERS,

VS.

MARSHA RICHARDSON, ET AL.,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents respectfully pray that the Petition for Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on July 22, 1983, be denied.

REASONS FOR DENYING WRIT

Petitioners have severely mischaracterized the judgment of both the District Court and the Court of Appeals. Contrary to Petitioners' bald assertion, the Fifth Circuit did not rely upon its pre-*Falcon* "across-the-board" class action standard in affirming the District Court Class Certification Order.

There are no special or important issues presented in

Petitioners' Petition for Certiorari. The Judgment of the Fifth Circuit Court of Appeals awards individual relief to only five successful class members. Furthermore, the County has already paid the awards to the five successful class members as part of a settlement with the Office of the Treasury.

Finally, Petitioners attempt to raise a number of issues in their Petition for the first time in this nearly decade long lawsuit. The decision below fully accords with the decisions of this Court. Petitioners' reliance upon this Court's decision in *General Telephone Company of the Southwest vs. Falcon*, 457 U.S. 147 (1982) is misplaced. *Falcon* did not hold that an employee could never adequately represent a class which included applicants. Indeed, *Falcon* expressly recognized that in appropriate circumstances an employee may represent a class of both applicants and employees. In language especially appropriate to the facts of this case this Court stated:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes.

Both the District Court and the Court of Appeals found Respondent to be a proper class representative of both unsuccessful female applicants and employees of the Sheriff's Department. One of the Respondent's successful challenges was the policy of the Dallas County Sheriff to assign all new female deputies to the jail and to restrict their transfers to a more desirable section. Because the

section of the jail available for females was smaller than the male section, the Sheriff's policy by necessity limited the number of female deputies that could be employed by the Sheriff's Office. The same policy, adversely affected employees by restricting their transfer and promotion opportunities. As such, both applicants and employees were adversely affected by the same practice. (A-9, Appendix to Petitioner's Brief)

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners contend that the decision of the Fifth Circuit conflicts with that of the Third Circuit in *Scott v. University of Delaware*, 601 F.2d 76 (3rd Cir. 1979). *Scott* is easily distinguishable from the case at bar. In *Scott* the Third Circuit found a conflict of interest between *Scott* and the other class members. *Scott* disputed the validity of the University's requirement of a doctoral degree as a primary hiring criterion. He thus attacked via the applicant class the very degree which he possessed and which he asserted in his own favor in seeking relief on his individual disparate treatment claim. *Scott*, 601 F.2d at 86. Respondent, unlike *Scott* was discriminated by the policies she was challenging.

Petitioners, in addition, assert that there is a conflict between the case at bar and the decision of the Tenth Circuit in *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981). Petitioners did not appeal the District Court's finding that a Deputy Sheriff is an employee within the meaning of Title VII and that the Commissioners are employers. (A-13, Appendix to Petition for Certiorari). Consequently, this argument cannot be raised for the first time before this Court. Federal Rules of Civil Procedure 46, 5A *Moore's Federal Practice* ¶46.02.

Petitioners' other challenges to the validity of the District Court's Class Certification and Order of Class Relief should not be considered by this Court because of Petitioners' failure to raise this issue either before the District Court or the Court of Appeals. On two separate occasions Petitioners specifically moved the District Court to reconsider the Class Certification Order. On April 22, 1980, the District Court denied Petitioners' Motion to Amend Findings of Fact and Conclusions of Law for new trial. On February 1, 1982, the District Court denied Petitioners' Motion for Reconsideration of Class Certification. In neither of these two specific motions, nor at trial nor on appeal did the Petitioners raise the many issues they are now contesting. Petitioners are now barred from raising any new issues before this Court more than four years after the District Court certified the class.

THE DECISION BELOW IS CORRECT

The Fifth Circuit was correct in rejecting the Petitioners' alternative argument that even if the Class were properly certified the five successful claimants did not sustain their burden of proof with respect to an entitlement of back pay. The Fifth Circuit correctly found that Petitioners' reliance upon *Burdine* was misplaced. As the Fifth Circuit stated "the burden of proof imposed on the Plaintiff in the liability phase of a Title VII Class Action, termed Phase I, differs from that imposed in the relief phase, termed Phase II." In this case, the District Court found classwide sex discrimination in Phase I. The Petitioners do not now challenge this ruling. Instead, they argue that the individual claimants did not meet their *Burdine* burden of proving an entitlement to back pay. *Burdine*, however, does not control in Phase II.

The decision of the Fifth Circuit fully accords with the prior decision of this Court in *Teamsters v. United States*, 431 U.S. 324, 362. In addition the Petitioners' argument as recognized by the Fifth Circuit ignores the clearly erroneous standard for reviewing the District Court's factual findings in support of their entitlement to back pay. *Pullman Standard vs. Swint*, 456 U.S. 273 (1982).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PALMER, PALMER & COFFEE

BY: _____
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840 One Main Place
Dallas, Texas 75250
(214) 748-1211

ATTORNEYS FOR RESPONDENTS

PROOF OF SERVICE

STATE OF TEXAS

COUNTY OF DALLAS

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared LINDA N. COFFEE, who being by me duly sworn, upon oath stated: I, LINDA N. COFFEE, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Respondents herein in all proceedings in which they have been involved as named parties in the Courts below.

I further state upon oath that upon the 9th day of November, 1983, I served copies of the foregoing Petition for Denying Writ of Certiorari on the Petitioners by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Earl Luna, Law Offices of Earl Luna, P.C., 2416 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, Attorney for Petitioners, Dallas County Commissions Court, et al., to Ms. Joann Peters, 401 Stemmons Tower West, 2730 Stemmons Freeway, Dallas, Texas 75207, Attorney for Respondent Carol Gassner, and to Ms. Sue LaGarde, Assistant District Attorney, 9th Floor, Dallas County Courthouse, Dallas, Texas 75202, on this 9th day of November, 1983.

_____

Linda N. Coffee

SUBSCRIBED AND SWORN to before me by the

said Linda N. Coffee, this the 9th day of November, 1983.

_____

Notary Public in and for
Dallas County, Texas